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7 IN THE UNITED STATES DISTRICT COURT
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9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 MICHELLE BARBER, No. C 08-4883 CW
12 Plaintiff,
13 v. ORDER GRANTING
14 CITY OF CRESCENT CITY, a California
Municipality; DOUGLAS PLACK; and ERIC
CAPON; and DOES 1-100 and Each of
15 Them Inclusive,
16 Defendants.
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Defendants City of Crescent City (the City), Douglas Plack and
Eric Capon move to dismiss the complaint. Plaintiff Michelle
Barber opposes the motion. The matter was taken under submission
on the papers. Having considered all of the papers filed by the
parties, the Court grants Defendants' motion and dismisses the
complaint with leave to amend.

25 BACKGROUND

26 According to the complaint, Plaintiff has been a police
27 officer for the Crescent City Police Department since 2000.
28 Defendant Plack is the Chief of Police. Defendant Capon is a

1 police sergeant.

2 Plaintiff alleges that, since 2005, Defendants have
3 "developed, implemented, authorized and ratified an ongoing
4 pattern, practice and policy of intentional gender discrimination,
5 harassment/hostile work environment and retaliation" against her,
6 "injuring her in the terms and conditions of her employment,
7 assignments, training, opportunities and promotional
8 opportunities." FAC ¶ 24. Plaintiff further alleges that, since
9 2006, Defendants "developed, implemented, authorized and ratified
10 an ongoing pattern, practice and policy of intentional sexual
11 harassment and retaliation" against Plaintiff and other female City
12 employees "and creation of a sexually hostile work environment,
13 which for [Plaintiff] included verbal abuse and physical touching.
14 During this period, these acts injured and re-injured [Plaintiff]
15 and were objectively and subjectively offensive." Id. ¶ 25.¹
16 Plaintiff states that she and others complained to Chief Plack, the
17 City Manager and the City Council, but nothing was done to correct
18 the situation. After Plaintiff filed a complaint with the Equal
19 Employment Opportunity Commission (EEOC) in September, 2007,
20 Defendants allegedly "engaged in an ongoing policy and practice of
21 intentional retaliation" against her. Id. ¶ 30.

22 Plaintiff asserts five claims against Defendants: 1) a Title
23 VII claim against the City for "intentional discrimination and
24 harassment" on the basis of her sex; 2) a Title VII claim against
25 the City for retaliation; 3) a claim under the California Fair
26 Employment and Housing Act (FEHA) against the City for

27
28 ¹It is not clear from the complaint whether and to what extent
the allegations in ¶ 24 overlap with those in ¶ 25.

1 "discrimination, harassment and retaliation" on the basis of her
2 sex; 4) a claim under 42 U.S.C. § 1983 against all Defendants for
3 violating her Fourteenth Amendment right to equal protection by
4 discriminating against her and harassing her on the basis of her
5 sex; 5) a claim under § 1983 against Defendants Plack and Capon for
6 violating her Fourteenth Amendment right to equal protection and
7 due process by retaliating against her.²

LEGAL STANDARD

9 A complaint must contain a "short and plain statement of the
10 claim showing that the pleader is entitled to relief." Fed. R.
11 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
12 claim is appropriate only when the complaint does not give the
13 defendant fair notice of a legally cognizable claim and the grounds
14 on which it rests. See Bell Atl. Corp. v. Twombly, 550 U.S. 544,
15 127 S. Ct. 1955, 1964 (2007). However, "[w]hile a complaint
16 attacked by a Rule 12(b)(6) motion to dismiss does not need
17 detailed factual allegations, a plaintiff's obligation to provide
18 the grounds of his entitlement to relief requires more than labels
19 and conclusions, and a formulaic recitation of the elements of a
20 cause of action will not do." Id. at 1964-65 (internal quotation
21 marks and citations omitted). Rather, the complaint must contain
22 sufficient factual allegations "to raise a right to relief above
23 the speculative level." Id. at 1965.

24 In considering whether the complaint is sufficient to state a
25 claim, the court will take all material allegations as true and

27 ²Plaintiff's constitutional claim for retaliation is more
28 consonant with a violation of the First Amendment than the
Fourteenth Amendment

1 construe them in the light most favorable to the plaintiff. NL
2 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
3 Although the court is generally confined to a consideration of the
4 allegations in the pleadings, the court may also consider matters
5 of which judicial notice may be taken. Doing so does not convert
6 the motion into one for summary judgment. United States v.
7 Ritchie, 342 F.3d 903, 909 (9th Cir. 1993). The court will deny a
8 motion to dismiss, unlike a motion for summary judgment, even where
9 the plaintiff is unable to demonstrate that material facts are in
10 dispute.

11 When granting a motion to dismiss, the court is generally
12 required to grant the plaintiff leave to amend, even if no request
13 to amend the pleading was made, unless amendment would be futile.
14 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
15 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
16 would be futile, the court examines whether the complaint could be
17 amended to cure the defect requiring dismissal "without
18 contradicting any of the allegations of [the] original complaint."
19 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).

20 DISCUSSION

21 I. Sufficiency of the Allegations in the Complaint

22 Read liberally, the complaint can be interpreted as asserting
23 three types of claims: one for a hostile work environment; a second
24 for intentional discrimination, i.e., discrimination other than by
25 subjection to a hostile work environment; and a third for
26 retaliation. All of Plaintiff's claims fail because they rely on
27 bald legal conclusions and are not supported by factual
28 allegations.

1 A. Hostile Work Environment

2 In order to state a hostile work environment claim based on
3 her sex, Plaintiff must allege: (1) that she was subjected to
4 verbal or physical conduct of a sexual nature; (2) that the conduct
5 was unwelcome; and (3) that the conduct was sufficiently severe or
6 pervasive to alter the conditions of her employment and create an
7 abusive work environment. See Vasquez v. County of Los Angeles,
8 349 F.3d 634, 642 (9th Cir. 2003).

9 Although Plaintiff has alleged that she was subjected to "a
10 sexually hostile work environment," this legal conclusion is not
11 supported by any factual allegations except the allegation that
12 Plaintiff experienced unspecified "verbal abuse and physical
13 touching." The complaint does not identify any unwanted verbal or
14 physical conduct of a sexual nature, let alone describe conduct
15 that was sufficiently severe or pervasive to alter the conditions
16 of Plaintiff's employment. Her hostile work environment claim will
17 therefore be dismissed with leave to amend to cure these defects.

18 B. Intentional Discrimination

19 To state a claim for employment discrimination based on
20 disparate treatment, Plaintiff must allege that: (1) she belongs to
21 a protected class; (2) she was subject to an adverse employment
22 action; and (3) similarly situated individuals outside her
23 protected class were treated more favorably. See Davis v. Team
24 Elec. Co., 520 F.3d 1080, 1089 (9th Cir. 2008).³

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³If the adverse employment action was denial of a promotion,
27 Plaintiff must also allege that she applied for the promotion and
28 was rejected despite her qualifications, and that her employer
filled the position with an employee not of Plaintiff's class or
(continued...)

1 The complaint alleges that Plaintiff is a member of a
2 protected class, but does not identify any adverse action taken
3 against her or allege that similarly situated male employees were
4 not treated in a similar way. Plaintiff's claim for intentional
5 discrimination will therefore be dismissed with leave to amend to
6 cure these defects.

7 || C. Retaliation

8 To establish a prima facie claim for retaliation under Title
9 VII, Plaintiff must show that: (1) she engaged in an activity
10 protected under Title VII; (2) the City subjected her to an adverse
11 employment action; and (3) there was a causal link between the
12 protected activity and the City's action. See Davis, 520 F.3d at
13 1093-94.

14 Although Plaintiff alleges that she engaged in a protected
15 activity by filing discrimination charges with the EEOC, she has
16 not identified any adverse employment action that was taken against
17 her or alleged facts sufficient to imply a causal link between any
18 such action and her EEOC charges. Accordingly, her retaliation
19 claim will be dismissed with leave to amend to cure these defects.

20 || II. Other Legal Bars to Relief

21 Defendants assert that Plaintiff's claims are legally barred
22 for a number of reasons unrelated to the sufficiency of the
23 allegations in the complaint. Although the Court finds that the
24 allegations in the complaint do not satisfy the notice pleading
25 requirements of the Federal Rules, the Court anticipates that

1 Defendants will raise their remaining arguments as grounds for
2 dismissing any second amended complaint. The Court will therefore
3 rule on those arguments.

4 A. Exhaustion of Administrative Remedies

5 1. Title VII

6 A person seeking relief under Title VII must first file a
7 charge of discrimination with the EEOC within 180 days of the
8 alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1).
9 If the EEOC does not bring suit based on the charge, the EEOC must
10 "notify the person aggrieved" that he or she can file suit. Id.
11 § 2000e-5(f)(1). The notice is accomplished through a right-to-sue
12 letter. A person may file suit within "ninety days after the
13 giving of such notice." Id.

14 Defendants note that, although Plaintiff raised her claims of
15 intentional discrimination and retaliation in two separate charges
16 with the EEOC, she did not allege a hostile work environment. They
17 therefore argue that she is precluded from asserting a hostile work
18 environment claim in this action.

19 Defendants appear to be correct that Plaintiff did not
20 specifically allege a hostile work environment in her EEOC
21 charges.⁴ However, "[e]ven when an employee seeks judicial relief
22 for claims not listed in the original EEOC charge, the complaint

23 ⁴The Court grants Defendants' request to take judicial notice
24 of the charges of discrimination and the EEOC's right-to-sue
25 letters. Plaintiff's objection to the documents, which is based on
26 a lack of authenticating testimony, is overruled. Although it
27 would have been preferable for Defendants to attach the documents
28 to a declaration attesting to their authenticity, Plaintiff does
not actually claim that the documents are inauthentic and, given
that she filed the charges and received the right-to-sue letters,
she would be in a position to do so. There does not appear to be
any serious question that the documents are authentic.

1 'nevertheless may encompass any discrimination like or reasonably
2 related to the allegations of the EEOC charge.'" Freeman v.
3 Oakland Unified Sch. Dist., 291 F.3d 632, 636 (9th Cir. 2002)
4 (quoting Oubichon v. N. Am. Rockwell Corp., 482 F.2d 569, 571 (9th
5 Cir. 1973)). Allegations are "reasonably related" to those in an
6 EEOC charge if they either "fell within the scope of the EEOC's
7 actual investigation or an EEOC investigation which can reasonably
8 be expected to grow out of the charge of discrimination." Id.
9 (quoting BKB v. Maui Police Dep't, 276 F.3d 1091, 1100 (9th Cir.
10 2002)) (emphasis in original). In determining whether allegations
11 are reasonably related, "it is appropriate to consider such factors
12 as the alleged basis of the discrimination, dates of discriminatory
13 acts specified within the charge, perpetrators of discrimination
14 named in the charge, and any locations at which discrimination is
15 alleged to have occurred." Id. (quoting BKB, 276 F.3d at 1100).

16 Plaintiff's first charge of discrimination alleges that she
17 was reprimanded in March, 2007 and that male employees were not
18 similarly treated. According to the complaint, Plaintiff was being
19 subjected to a sexually hostile work environment at the time she
20 received the reprimand. It is likely that any EEOC investigation
21 of the reprimand would have looked into the nature of Plaintiff's
22 work environment, in that any evidence of a sexually hostile work
23 environment would have supported a finding that Plaintiff's
24 reprimand was discriminatory. The hostile work environment
25 allegations are therefore reasonably related to the allegations in
26 Plaintiff's first EEOC charge, and the Court will not dismiss the
27 hostile work environment claim for failure to exhaust.

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1 2. FEHA

2 FEHA, like Title VII, requires a plaintiff to exhaust his or
3 her administrative remedies prior to bringing suit. This involves
4 filing a complaint with the California Department of Fair
5 Employment and Housing (DFEH) and receiving a right-to-sue letter.
6 Martin v. Lockheed Missiles & Space Co., 29 Cal. App. 4th 1718,
7 1724 (1994).

8 Plaintiff alleges in the complaint that she exhausted her
9 administrative remedies under FEHA by filing complaints with the
10 DFEH and receiving right-to-sue letters. No documents from the
11 DFEH proceedings have been submitted in this proceeding, and thus
12 the allegations in the complaint stand unquestioned. Defendants,
13 however, argue that Plaintiff's FEHA claim should be dismissed
14 because she does not allege that she served the DFEH right-to-sue
15 letters on them. In support of this argument, Defendants cite only
16 subsections (a) and (b) of California Government Code §§ 12965(a).
17 These subsections do not contain a service requirement of the type
18 Defendants describe, and do not appear to have anything to do with
19 this case. Nor does Martin, which Defendants cite for the general
20 proposition that a FEHA plaintiff must exhaust his or her
21 administrative remedies with the DFEH, describe such a service
22 requirement. Because Defendants have provided no legal support for
23 their FEHA exhaustion argument, the Court rejects it.

24 3. Section 1983

25 Defendants argue that Plaintiff may not proceed with her
26 fourth or fifth cause of action against Defendants Plack and Capon
27 because she has not exhausted her administrative remedies under
28 Title VII by filing a charge of discrimination against them with

1 the EEOC. Defendants rely on the incorrect assumption that the
2 fourth and fifth causes of action are brought under Title VII. As
3 the complaint states, these causes of action are brought under
4 § 1983, and Defendants have cited no authority for the proposition
5 that a plaintiff must pursue administrative remedies before
6 bringing a § 1983 action against individual state employees for
7 employment discrimination.

8 4. Compliance with the California Tort Claims Act
9 California's Tort Claims Act, Cal. Gov't Code § 810 et seq.,
10 requires that a plaintiff seeking to assert certain claims under
11 state law must first file an administrative claim with the
12 appropriate state agency. Defendants assert that Plaintiff's
13 claims under Title VII and § 1983 are barred because Plaintiff did
14 not comply with the Tort Claims Act. This argument is wholly
15 without legal support. Defendants cite no authority for the
16 proposition that the California Tort Claims Act, which (as its name
17 suggests) applies primarily to common law tort claims, precludes a
18 plaintiff from asserting federal claims in federal court.

19 B. Statute of Limitations

20 As noted above, a person may file suit within "ninety days
21 after the giving of" a right-to-sue letter. 42 U.S.C.
22 § 2000e-5(f)(1). Defendants assert that Plaintiff did not file
23 suit within ninety days of the date of the EEOC's right-to-sue
24 letters, and her claims are therefore time-barred. However,
25 Defendants' argument is premised on the incorrect assumption that
26 Plaintiff was required to file the complaint within ninety days of
27 the date on which the letters were dated: July 24, 2008. In fact,
28 as the letters themselves state, and as confirmed by controlling

1 authority that Defendants do not cite, Plaintiff was required to
2 file the complaint within ninety days of the date on which she
3 received the letters. Defs.' Req. for Judicial Notice Ex. B; Payan
4 v. Aramark Mgmt. Servs. Ltd. P'ship, 495 F.3d 1119, 1122 (9th Cir.
5 2007) ("We measure the start of the limitations period from the
6 date on which a right-to-sue notice letter arrived at the
7 claimant's address of record.").

8 According to the complaint, Plaintiff received the letters on
9 July 28, 2008. Ninety days after July 28 is October 26. In 2008,
10 October 26 fell on a Sunday. Accordingly, Plaintiff was required
11 to file the complaint by October 27, 2008. See Fed. R. Civ. P.
12 6(a)(3). The complaint was filed on October 24, 2008, and thus was
13 timely.

14 Confronted with the fact that the ninety-day limitations
15 period begins to run upon receipt of a right-to-sue letter,
16 Defendants urge the Court to disbelieve the first amended
17 complaint's allegation that Plaintiff received the letters on July
18 28, 2008, because the original complaint did not contain such an
19 allegation. There is, of course, no basis for the Court to refuse
20 to credit any of the allegations in the first amended complaint on
21 this motion. And, in any event, Payan establishes a rebuttable
22 presumption that Plaintiff received the right-to-sue letters three
23 days after they were mailed. 495 F.3d at 1125. Thus, even in the
24 absence of an allegation regarding Plaintiff's actual receipt of
25 the letters, she would be presumed to have received them on July
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1 27, 2008.⁵ Ninety days after July 27 is October 25. Because
2 October 25, 2008 was a Saturday, Plaintiff would have had until
3 October 27, 2008 to file the complaint. Accordingly, even if the
4 Court were to disregard Plaintiff's allegation that she received
5 the letters on July 28, 2008, the action would still be timely.

6 C. Redundancy

7 Defendants argue that the fourth and fifth causes of action
8 against the City are redundant and must be dismissed. To begin
9 with, the fifth cause of action is asserted against Defendants
10 Plack and Capon, not the City, and thus Defendants request relief
11 that cannot be granted. As for the fourth cause of action, even if
12 redundancy of the type Defendants allege would be grounds for
13 dismissing it, it is distinct from Plaintiff's first three causes
14 of action against the City. Those causes of action charge the
15 City, as Plaintiff's employer, with violating Title VII and FEHA on
16 the basis that the City engaged in conduct directed at her
17 particularly. The fourth claim is brought pursuant to § 1983 and
18 alleges constitutional violations based on the City's alleged

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20 ⁵The letter was mailed on July 24, 2008 -- a Thursday -- and
21 Saturdays and Sundays are normally excluded from any computation
22 involving a time period of less than eleven days. Fed. R. Civ. P.
23 6(a)(2). Nonetheless, the Ninth Circuit in Payan included a
24 Saturday and Sunday in calculating the end of the three-day period
25 in that case, which fell on a Monday. See 495 F.3d at 1125. It is
26 not clear whether the Payan court intentionally departed from the
27 ordinary rule regarding Saturdays and Sundays or merely overlooked
28 it. Departing from the rule here would result in the legal fiction
received on July 27, it should either exclude July 26 and 27 from
the calculation pursuant to Rule 6(a)(2), which would lead to a
presumption of receipt on July 29, or deem the letter received on
the next business day after July 27 pursuant to Rule 6(a)(3), which
would lead to a presumption of receipt on July 28; even calculating
the ninety-day period as beginning on July 27, the action is
timely.

1 "policy or custom" of discriminating against female police
2 officers. See Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S.
3 658, 691 (1978). It is not redundant and will not be dismissed as
4 such.

5 D. Claims Against Individual Defendants

6 Defendants argue that "individual Defendants cannot be sued
7 for discrimination or retaliation," and thus the fourth and fifth
8 claims against Defendants Capon and Plack must be dismissed. In
9 support of their argument, they cite only California case law
10 holding that individual employees cannot be sued for discrimination
11 or retaliation under FEHA. Plaintiff's claims against Defendants
12 Capon and Plack are brought under § 1983, not FEHA, and Defendants
13 have pointed to no law suggesting that these Defendants cannot be
14 held liable under § 1983.

15 Defendants also argue that Plaintiff's § 1983 claims against
16 Capon and Plack must be dismissed because she has not shown that
17 they were acting under color of state law. It is true that the
18 complaint contains no specific allegations about these Defendants'
19 involvement in any discriminatory acts, and for this reason it
20 fails to state a claim against them. Nonetheless, it is clear that
21 Plaintiff charges Capon and Plack with liability for their role as
22 supervisory officials within the Crescent City Police Department.
23 To the extent any second amended complaint contains allegations
24 sufficient to state a claim under this general theory of liability,
25 it will demonstrate that Capon and Plack were acting under color of
26 state law.

27 Defendants further argue that Plaintiff's claims against Capon
28 and Plack in their official capacities must be dismissed. It is

1 true that a § 1983 action cannot be brought against state actors in
2 their official capacities because such a claim is essentially one
3 against the state itself,⁶ but the complaint explicitly states that
4 Capon and Plack are being sued in their individual capacities.
5 Defendants' insistence that Capon and Plack are being sued in their
6 official capacities reflects a misapprehension of the concept of
7 official capacity liability. Defendants appear to believe that any
8 claim against an individual based on conduct taken in the course of
9 discharging his or her duties as an agent of the state is, by
10 nature, an attempt to impose official capacity liability. This
11 cannot be the case, because Defendants' theory would preclude all
12 claims against individuals acting under color of state law, thereby
13 eviscerating § 1983.

14 E. Section 1983 Claims Against the City

15 Defendants correctly note that, for the City to be liable for
16 employment discrimination under § 1983, Plaintiff must allege that
17 a City policy, custom or practice caused her injury. See Monell,
18 436 U.S. at 691. Because the complaint does not contain sufficient
19 allegations to state a claim against any Defendant, the Court
20 cannot determine whether Plaintiff has properly alleged that any
21 discrimination represented a policy, custom or practice of the
22 City. The Court notes, however, that Plaintiff alleges that she
23 complained about the discrimination she was experiencing to the
24 City Counsel and the City Manager directly. Depending on the
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26 ⁶Capon and Plack are employees of a municipality, not the
27 State of California. An official capacity claim against them
therefore would not be barred by the Eleventh Amendment, but would
28 be subject to the same limitations as Plaintiff's § 1983 claim
against the City itself. See Monell, 436 U.S. 658.

1 nature and degree of involvement of high-level City officials,
2 Plaintiff may be able to state a Monell claim in the Second Amended
3 Complaint against the City.

4 F. Governmental Immunity

5 Defendants argue that, pursuant to California statute, they
6 enjoy absolute immunity from liability on all of Plaintiff's
7 claims. This argument is frivolous and requires little discussion.
8 Suffice it to say that there is no authority for the sweeping
9 proposition that state agencies and their employees are immune from
10 liability for employment discrimination under Title VII, § 1983 and
11 FEHA. The cases and statutes Defendants cite are not on point.

12 CONCLUSION

13 For the foregoing reasons, Defendants' motion to dismiss
14 (Docket No. 19) is GRANTED. The complaint is dismissed with leave
15 to amend to allege facts sufficient to cure the defects identified
16 in this order. If Plaintiff wishes to file a second amended
17 complaint, she must do so by March 31, 2009 or the case will be
18 closed. An answer or motion to dismiss must be filed by April 20,
19 2009.

20 The hearing scheduled for March 19, 2009 is VACATED. The case
21 management conference scheduled for March 19, 2009 is continued to
22 May 28, 2009 at 2:00 p.m. Any motion to dismiss the second amended
23 complaint must be noticed for hearing simultaneously with the case
24 management conference.

25 IT IS SO ORDERED.

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27 Dated: 3/17/09
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CLAUDIA WILKEN
United States District Judge